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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PATRICIA D. JOHNSON, Plaintiff and Appellant, v. JOHN MORALES, Defendant and Respondent.	B204818 (Los Angeles County Super. Ct. No. BC354733)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia Ann Bigelow, Judge. Affirmed.

Leviton Law Group and Stuart L. Leviton for Plaintiff and Appellant.

Martin & Martin, Areva D. Martin and Rosa M. Kwong for Defendant and Respondent.

Plaintiff and appellant Patricia Johnson (Johnson) appeals from a judgment on the pleadings entered against her in her action against defendant and respondent John Morales (Morales) for racial harassment in violation of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq. (FEHA)). We affirm the judgment.

BACKGROUND

Johnson, who is of Austrian, Hungarian, and African descent, is an instructor of psychology at Los Angeles Mission College (LAMC). Morales, who is of Mexican descent, is the chair of LAMC's Social Sciences Department.

1. Complaint and First Amended Complaint

Johnson commenced this action on June 29, 2006, against Morales, the Los Angeles Community College District (LACCD), and others, alleging that since joining the LAMC as an instructor in 2001, she has been subjected to unlawful harassment based on her race by Morales and others. On October 26, 2006, Johnson filed a first amended complaint alleging nine causes of action, including unlawful discrimination, unlawful harassment, and retaliation in violation of FEHA. Morales and the other defendants demurred to the first amended complaint, and the trial court sustained the demurrer with leave to amend to all but three causes of action that are not relevant to this appeal.

2. Second Amended Complaint

On February 2, 2007, Johnson filed a second amended complaint alleging against Morales a sole cause of action for unlawful racial harassment. Morales and the other defendants again demurred, and the trial court sustained the demurrer with leave to amend. With regard to the racial harassment cause of action asserted against Morales, the trial court found "that the complaint suggests only sporadic incidents which cannot properly be called harassment or be objectively linked to race."

3. Third Amended Complaint

On April 23, 2007, Johnson filed a third amended complaint, the operative pleading in this appeal, again alleging against Morales a single cause of action for

unlawful harassment in violation of FEHA.[1] In her third amended complaint, Johnson alleges that Morales, as the chair of the Social Sciences Department, "exercised certain supervisory controls over" her. Johnson further alleges that Morales interfered with her ability to perform her job by blocking her access to necessary equipment and classroom facilities, by improperly seeking a position on a faculty evaluation committee, by interfering with Johnson's ability to hire adjunct faculty members, by assigning Johnson to teach a course she was not qualified to teach, and by refusing to give Johnson proposed course schedules for upcoming semesters.

Johnson alleges in her third amended complaint that Morales verbally harassed her. She claims that Morales "repeatedly has asserted the superiority of Mexicans and individuals of Mexican descent and the inferiority of everyone else," has stated that "the only Instructors who should be hired are Mexican Instructors," and has made "various ethnic slurs" at department meetings. Johnson alleges that Morales was responsible for critical remarks about her that appeared in a periodical published by a student organization for which Morales served as an advisor. Johnson further alleges that Morales directed another faculty member who sat in a cubicle near Johnson's to have "staged" telephone conversations about lawsuits Morales had filed in order to intimidate her.

Johnson's third amended complaint alleges physical harassment by Morales as well. Johnson claims that in March 2005, Morales stood and waited outside her classroom, "with no apparent reason for being there other than to harass [her]," that in July 2005 he chose to occupy a cubicle next to hers as "a deliberate attempt to increase his harassment of her," and that in November 2005, Morales pushed her into a partition as he passed by her.

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[1] The third amended complaint also alleged a harassment cause of action against LACCD and another individual defendant, as well as causes of action against LACCD and other defendants for unlawful discrimination in violation of FEHA, aiding and abetting a FEHA violation, failure to prevent discrimination, and failure to prevent harassment.

4. LACCD's Demurrer to the Third Amended Complaint

On May 25, 2007, LACCD and another individual defendant demurred to the third amended complaint. Morales filed a joinder to the demurrer. On July 9, 2007, the trial court denied Morales's motion for joinder and sustained the demurrer, without leave to amend, as to the harassment cause of action.[2]

5. Morales's Motion for Judgment on the Pleadings

On July 12, 2007, Morales filed a motion for judgment on the pleadings, arguing that Johnson had failed to plead a claim of racial harassment in violation of FEHA. The trial court granted the motion without leave to amend, dismissed the third amended complaint with prejudice as to Morales, and entered judgment in Morales's favor. This appeal followed.

DISCUSSION

I. Standard of Review

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer: We treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. . . . We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. [Citation.]" (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We review the trial court's denial of leave to amend for abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

II. Racial Harassment In Violation of FEHA

A. Applicable Law

FEHA prohibits harassment of an employee because of race. (Gov. Code, § 12940, subd. (j)(1).) "Harassment" is defined by regulation to include "[v]erbal harassment, e.g., epithets, derogatory comments or slurs" (Cal. Code Regs., tit. 2,

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[2] The trial court also sustained the demurrer as to the cause of action for aiding and abetting a FEHA violation but overruled the demurrer as to certain other causes of action that are not relevant to this appeal.

§ 7287.6, subd. (b)(1)(A)), and "[p]hysical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement when directed at an individual on a basis enumerated in the Act" (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(B)). "As the regulation implies, harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63 (*Janken*).) Thus, "commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will or who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment." (*Id.* at pp. 64-65.)

In order to state a claim for racial harassment under FEHA, a plaintiff must plead the following elements: (1) she belongs to a protected group; (2) she was subjected to harassment; (3) the harassment was based upon her race or nationality; and (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608 (*Fisher*).)

To be actionable under FEHA, the harassment must be "sufficiently severe or pervasive" to create a hostile or abusive working environment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 462 (*Etter*).) In determining what constitutes "sufficiently pervasive" harassment, courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial; rather, the plaintiff must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. (*Fisher, supra,* 214 Cal.App.3d at pp. 609-610; *Aguilar v. Avis Rent a Car Sys.* (1999) 21 Cal.4th 121, 131 (*Aguilar*).) Relevant factors include: (1) the frequency of the racial conduct; (2) the

severity of the racial conduct; (3) whether the racial conduct was physically threatening or humiliating, or a mere offensive utterance; and (4) whether the racial conduct unreasonably interfered with the plaintiff's work performance. (*Etter, supra,* at p. 466.)

B. Alleged Verbal Harassment

To plead a cause of action for verbal harassment based on race, Johnson must allege facts showing verbal harassment, epithets, derogatory comments, or slurs based on race. (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A); Code Civ. Proc., § 438.) Although Johnson alleges in her third amended complaint that Morales "verbally harassed" her and made "various ethnic slurs," the facts offered to support these allegations are insufficient to establish harassment under FEHA.

The third amended complaint sets forth facts concerning two incidents in which Morales allegedly made statements that were based on race. The first incident occurred in August 2003, in a conference room in which Johnson was present. Morales, referring to the occupancy limits for the room, purportedly stated words to the effect, "We're Chicanos. We'll bring as many people in as we want. We don't have to follow the fire department rules." The second incident also occurred in August 2003, when Morales arrived late to a meeting and stated, "We work on Chicano time here." Neither incident involved racially derogatory or demeaning comments. In both cases, Morales made remarks about his own race or ethnicity, not Johnson's. Although Morales's remarks can be viewed as expressions of ethnic pride that might be offensive to some, they cannot objectively be viewed, as Johnson alleges, as asserting "the superiority of Mexicans and individuals of Mexican descent and the inferiority of everyone else." Johnson's subjective belief that Morales's conduct was racially motivated and directed at her is not relevant to determining whether that conduct constituted actionable harassment under FEHA. (*Aguilar, supra*, 21 Cal.4th at pp. 130-131.) The allegations are insufficient to state a claim for racial harassment. (*Etter, supra*, 67 Cal.App.4th at pp. 464-465; *Guthrey v. Cal.* (1998) 63 Cal.App.4th 1108, 1124 (*Guthrey*).)

Johnson alleges in her third amended complaint that "Morales has stated that only Mexicans or individuals of Mexican descent should be hired as faculty." She provides no

facts, however, as to when, where, and to whom Morales purportedly made this statement. The only facts offered to support this allegation concern Johnson's conduct, not Morales's. The third amended complaint states that "in a supposedly confidential written evaluation of Morales by Johnson dated June 3, 2004, Johnson reported to LACCD that Morales said, 'the only Instructors who should be hired are Mexican Instructors.'" The trial court had previously noted the inadequacy of this allegation in its order sustaining the LACCD's demurrer to the third amended complaint, as follows: "[T]he statements alleged by Johnson to have been made in her written evaluation of Morales are not conduct by Morales, merely Johnson's report of them -- as such, they are not allegations as to Morales's conduct, but rather Johnson's as to what she wrote." These allegations are insufficient to support a claim of verbal harassment under FEHA.

The remainder of Johnson's allegations concern conduct by persons other than Morales and have no objective connection to race, and are therefore insufficient to support a claim against Morales. For example, Johnson's allegation that she overheard telephone conversations by another faculty member about lawsuits Morales had filed state no facts about Morales's conduct, nor do they have any objective connection to race. That Johnson believed these conversations were "staged," at Morales's request, in order to intimidate her, is of no consequence, as Johnson's subjective perception is not relevant to her harassment claim. (*Aguilar, supra*, 21 Cal.4th at p. 130.) Similarly, Johnson's allegation that Morales was somehow responsible for criticisms about her that were published in a student newspaper state no facts about conduct by Morales or any comments based on race.

The third amended complaint fails to state facts sufficient to constitute a legally cognizable claim for verbal harassment under FEHA. (See *Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650.)

C. Alleged Physical Harassment

To state a claim for physical harassment based on race, Johnson must allege facts showing an "assault, impeding or blocking movement, or any physical interference with

normal work or movement" directed at her on the basis of her race or ethnicity. (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(B).) She has failed to do so.

The allegation that Morales "stood and waited" outside of Johnson's classroom "with no apparent reason for being there other than to harass Johnson" is insufficient to establish physical harassment. Morales's mere presence outside of Johnson's classroom was not an assault, nor did it block or impede Johnson's movement or interfere with her work. (See Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(B).) Moreover, Johnson's subjective belief that Morales's conduct was racially motivated is insufficient to establish that it was. (*Aguilar, supra*, 21 Cal.4th at p. 130.)

Similarly, Johnson's allegation that Morales once pushed her into a partition as he passed by her is insufficient to state a claim of racial harassment. Although Johnson alleges that Morales did so as "part of his on-going and continuing pattern and practice of harassing [her] because she is neither Mexican nor of Mexican ancestry," there are no facts to support Johnson's subjective belief that Morales's conduct in this instance was racially motivated. The incident was both isolated and objectively race-neutral, and therefore not actionable under FEHA. (*Guthrey, supra*, 63 Cal.App.4th at p. 1124.)

D. Other Conduct

The remainder of Johnson's allegations against Morales -- selecting a cubicle adjacent to hers, taking equipment Johnson had ordered for use in her class, seeking a position on the faculty evaluation committee, objecting to Johnson's request for a larger classroom, interfering with Johnson's ability to hire adjunct faculty, assigning Johnson to teach a course she was not qualified to teach, and refusing to give Johnson proposed schedules for upcoming semesters -- concern personnel management decisions that do not come within the definition of harassment under FEHA. (See *Janken, supra*, 46 Cal.App.4th at pp. 79-80.) The allegations are therefore insufficient to support a claim for racial harassment. (*Ibid.*)

E. Liability of a Supervisor Based on a Single Improper Act

Johnson cites *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30 (*Dee*), as authority for the proposition that a single offensive act by a supervisor may be sufficient

to establish a hostile work environment. She contends that because Morales "exercised certain supervisory controls over" her for a significant period of time, he may be held liable, under *Dee*, for any one of the multiple acts alleged against him. *Dee*, however, is distinguishable from the instant case.

In *Dee*, the court reversed a summary judgment entered against an employee on a hostile work environment claim, concluding that a supervisor's single ethnic slur, combined with other evidence, established a triable issue of fact regarding the existence of a hostile work environment. (*Dee, supra*, 106 Cal.App.4th at p. 35.) The court in *Dee* observed that although "[i]n many cases, a single offensive act by a coemployee is not enough to establish employer liability for a hostile work environment . . . where that act is committed by a supervisor, the result may be different. [Citation.]" (*Id.* at p. 36.) The court found that a supervisor's remark to an employee of Filipino descent that "'it is your Filipino understanding versus mine'" was an "ethnic slur, both abusive and hostile." The court further determined that a reasonable trier of fact could infer that the racial slur was not an isolated event based on evidence that the supervisor called the employee a "'bitch'" and "'constantly'" used the word "'asshole,'" berated and "'harassed'" the employee, ordered her to lie, and blamed her for tasks he ordered her to perform. (*Id.* at pp. 36-37.)

Here, in contrast, there were no ethnic slurs or derogatory comments directed at Johnson because of her race or ethnicity, nor was there any similarly abusive or hostile language or conduct. The only racially based comments attributed to Morales were two comments about his own ethnicity. *Dee* does not compel reversal of the judgment.

III. Denial of Leave to Amend

Johnson bears the burden of demonstrating the manner in which she could amend the complaint to state a cause of action for harassment. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322.) She has not met this burden. The trial court's denial of leave to amend accordingly was not an abuse of discretion.

DISPOSITION

The judgment is affirmed. Morales is awarded his costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST